



Section 8 of the OPEN Government Act

Tuesday, June 7, 2005

Mr. President, on February 16, shortly before the President's Day recess, the Senator from Vermont and I introduced the OPEN Government Act of 2005 (S. 394) – bipartisan legislation to promote accountability, accessibility, and openness in government, principally by strengthening and enhancing the federal law commonly known as the Freedom of Information Act.

When I served as Attorney General of Texas, it was my responsibility to enforce Texas's open government laws. I am pleased to report that Texas is known for having one of the strongest set of open government laws in our nation. And since that experience, I have long believed that our federal government could use "a little Texas sunshine." I am thus especially enthusiastic about the OPEN Government Act, because that legislation attempts to incorporate some of the most important principles and elements of Texas law into the federal Freedom of Information Act. And I am gratified that Senators Alexander, Feingold, Isakson, and Nelson of Nebraska are co-sponsors of the bipartisan Cornyn-Leahy bill.

This legislation enjoys broad support across the ideological spectrum. Indeed, since its introduction on February 16, the legislation has attracted additional support. In particular, I am pleased to report the endorsements of three conservative public interest groups – one devoted to the defense of property rights (Defenders of Property Rights, led by Nancie G. Marzulla), one devoted to the issue of racial preferences in affirmative action programs (One Nation Indivisible, led by Linda Chavez), and one devoted to the protection of religious liberty (Liberty Legal Institute, led by Kelly Shackelford). I ask unanimous consent that their endorsement letters be included in the record at the close of my remarks. The point of including these letters in the record, of course, is not that these groups are right or wrong in the pursuit of their respective causes, but that the cause of open government is neither a Republican nor a Democrat issue – neither a conservative nor a liberal issue – rather, it is an American issue.

I would like to take a few moments to emphasize one particular provision of the Cornyn-Leahy bill – section 8. It is a common sense provision. This provision should not be at all controversial, and indeed, I am not aware of any opposition whatsoever to it. The provision would simply help to ensure an open and deliberate process in Congress, by providing that any future legislation to establish a new exemption to the federal Freedom of Information Act must be stated explicitly within the text of the bill. Specifically, any future attempt to create a new so-called "(b)(3) exemption" to the federal FOIA law must specifically cite section (b)(3) of FOIA if it is to take effect. The justification for this provision is simple: Congress should not establish new secrecy provisions through secret means. If Congress is to establish a new exemption to FOIA, it should do so in the open and in the light of day.

A recent news report published by the Cox News Service amply demonstrates the importance of this issue, and specifically emphasizes the need for section 8 of the Cornyn-Leahy bill. I ask unanimous consent that a copy of this news report be included at the close of my remarks.

Senator Leahy and I firmly believe that all of the provisions of the OPEN Government Act are important – and that, as the recent Cox News Service report demonstrates, section 8 in particular is a worthy provision that can and should be quickly enacted into law. We note that July 4 is the anniversary of the 1966 enactment of the original federal Freedom of Information Act. Accordingly, we plan to devote our efforts this month to getting section 8 approved by Congress and submitted to the President for his signature by that anniversary date.

Toward that end, we rise today to introduce separate legislation to enact section 8 of the OPEN Government Act into law. We ask our colleagues in this chamber to support this measure, first in the Senate Judiciary Committee, and then on the floor of the United States Senate. And we look forward to working with our colleagues in the House – including Representative Lamar Smith, the lead sponsor of the OPEN Government Act in the House (H.R. 867), as well as Chairman Tom Davis, who leads the House Committee on Government Reform, and Chairman Todd Platts, who leads the House Government Reform subcommittee that recently held a hearing to review the federal FOIA law.

Section 8 of the Cornyn-Leahy bill is a common-sense, uncontroversial provision that deserves the support of every member of Congress. It simply provides that, when Congress enacts legislation – specifically, legislation to exempt certain documents from disclosure under FOIA – it do so in the open. After all, if documents are to be kept secret by an act of Congress, we should at least make sure that that very act of Congress itself not be undertaken in secret.

A Senate Judiciary subcommittee held a hearing on the OPEN Government Act on March 15. I hope that at least section 8 of the legislation can be enacted into law quickly, and that Congress will then move to consider the other important provisions of the bill.

I yield the floor.

Congress cloaks more information in secrecy
By REBECCA CARR
Cox News Service
Friday, June 03, 2005

WASHINGTON — Few would argue with the need for a national livestock identification system to help the federal government handle a disease outbreak such as mad cow.

But pending legislation calling for the nation's first electronic livestock tracking system would prohibit the public from finding out anything about animals in the system, including the history of a cow sick with bovine spongiform encephalopathy.

The only way the public can find out such details is if the secretary of agriculture makes the information public.

That's because the legislation, sponsored by Rep. Collin C. Peterson, D-Minn., includes a provision that exempts information about the system from being released under the Freedom of Information Act.

Formally called the "third exemption," it is one of nine exemptions the government can use to deny the release of information requested under the FOI Act.

Open government advocates say it is the most troubling of the nine exemptions because it allows Congress to cloak vital information in secrecy through legislation, often without a public hearing or debate. They say Congress frequently invokes the exemption to appease private sector businesses, which argue it is necessary to protect proprietary information.

"It is an easy way to slap a secrecy stamp on the information," said Rick Blum, director of openthegovernment.org, a coalition of more than 30 groups concerned about government secrecy.

The legislative intent of Congress is far more difficult to challenge than a federal agency's denial for the release of information, said Kevin M. Goldberg, general counsel to the American Society of Newspaper Editors.

"This secrecy is often perpetuated in secret as most of the (third exemption) provisions consist of one or two paragraphs tucked into a much larger bill with no notice that the Freedom of Information Act will be affected at all," Goldberg said.

There are at least 140 cases where congressional lawmakers have inserted such exemptions, according to a 2003 Justice Department report.

The report notes that Congress has been "increasingly active in enacting such statutory provisions."

The exemptions have become so popular that finding them in proposed legislation is "like playing a game of Wackamole," one staffer to Sen. Patrick Leahy, D-Vt., joked. "As soon as you handle one, another one pops up."

Congress used the exemption in its massive Homeland Security Act three years ago, granting businesses protection from information disclosure if they agreed to share information about the vulnerabilities of their facilities.

And in another twist on the exemption, Congress inserted a provision into the Consolidated Appropriations Act of 2004 that states that "no funds appropriated under this or any other act may be used to disclose" records about firearms tracking to the public.

Government agencies have also sought protection from information disclosure.

For example, Congress passed an amendment to the National Security Act in 1984 that exempted the CIA from having to comply with the search and review requirements of the FOI Act for its "operational files."

Most of the information in those files, which included records about foreign and counter-intelligence operations, was already protected from disclosure under the other exemptions in the FOI Act.

But before Congress granted the exemption, the agency had to search and review each document to justify withholding the information, which cost time and money.

Open government advocates say many of the exemptions inserted into legislation are not justified.

"This is back door secrecy," said Thomas Blanton, executive director of the National Security Archive at George Washington University, a nonprofit research institute based in Washington.

When an industry wants to keep information secret, it seeks the so-called third exemption, he said.

"It all takes place behind the sausage grinder," Blanton said. "You don't know what gristle is going through the spout, you just have to eat it."

But Daniel J. Metcalfe, co-director off the Justice Department's Office of Information and Privacy, said the exemption is crucial to the FOI Act's structure.

In the case of the animal identification bill, the exemption is critical to winning support from the cattle industry and on Capitol Hill.

"If we are going to develop an animal ID system that's effective and meaningful, we have to respect participants' private information," said Peterson, the Minnesota lawmaker who proposed the identification system. "The goal of a national animal I.D. system is to protect livestock owners as well as the public."

As the livestock industry sees it, it is providing information that will help protect the public health. In exchange for proprietary information about their herds, they believe they should receive confidence that their business records will not be shared with the public.

"The producers would be reluctant to support the bill without the protection," said Bryan Dierlam, executive director of government affairs at the National Cattleman's Beef Association.

The animal identification bill provides the government with the information it needs to protect the public in the event of an disease out break, Dierlam said. "But it would protect the producers from John Q. Public trying to willy-nilly access their information."

Food safety experts agree there is a clear need for an animal identification system to protect the public, but they are not certain that the exemption to the FOI Act is necessary.

"It's sad that Congress feels they have to give away something to the cattle industry to achieve it," said Caroline Smith DeWaal, director of the food safety program at the Center for Science in the Public Interest, a nonprofit organization based in Washington.

Slipping the exemption into legislation without notice is another problem cited by open government advocates.

It has become such a problem that the Senate's strongest FOI Act supporters, Sen. John Cornyn, R-Texas, and Sen. Patrick Leahy, D-Vt., proposed that lawmakers be required to uniformly identify the exemption in all future bills.

"If Congress wants to create new exemptions, it must do so in the light of day," Cornyn said. "And it must do so in a way that provides an opportunity to argue for or against the new exemption — rather than have new exemptions creep into the law unnoticed."

Leahy agreed, saying that Congress must be diligent in reviewing new exemptions to prevent possible abuses.

"In Washington, loopholes tend to beget more loopholes, and it's the same with FOI Act exemptions," Leahy said. "Focusing more sunshine on this process is an antidote to exemption creep."

May 25, 2005

The Honorable John Cornyn
517 Hart Senate Office Building
Washington, DC 20510

Dear Senator Cornyn:

On behalf of the Defenders of Property Rights, I would like to commend you on your introduction of the *Openness Promotes Effectiveness in our National Government Act of 2005 (OPEN Government Act)*. With this legislation, Americans can have confidence that their government is operating honestly and efficiently.

This proposed bill would be invaluable in aiding our quest to protect the private property rights of all Americans. The bill is beneficial for property rights plaintiffs – it puts teeth into the requirement that the government timely respond to requests while still protecting private property rights. For instance, under the bill, if an agency does not respond within the required 20 days, the agency may not assert any exemption under subsection (b) of the bill unless disclosure would endanger national security, “disclose personal private information protected by section 552a *or proprietary information*,” or would otherwise be prohibited by law. The bill also provides for better review of agencies’ responses to FOIA requests and for disciplinary actions for arbitrary and capricious rejections of requests. If passed, this bill would surely help private property owners obtain faster access to information regarding actions that have taken their property – and provide better enforcement if they do not.

Your bill has our full and enthusiastic endorsement. We thank you for your steadfast commitment to liberty, open government, and constitutionally guaranteed property rights.

Yours truly,

Nancie G. Marzulla
President

One Nation Indivisible

May 19, 2005

Senator John Cornyn
United States Senate
Washington, DC

Dear Senator Cornyn,

I am writing to tell you that One Nation Indivisible supports the OPEN Government Act of 2005. Good luck with its passage.

Sincerely,



Linda Chavez

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06/01/05

The Honorable John Cornyn
United States Senate
Washington, D.C. 20510

Re: "OPEN Government Act" bill

Dear Senator Cornyn,

We are fully on board with your efforts on Freedom of Information Act improvements. The government should be open to its people. This is a core requirement in any free society.

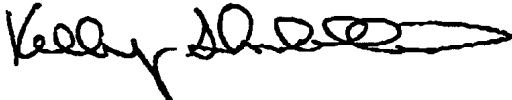
FOIA currently has little enforcement capability and was also hurt by the wrongly decided *Buckhannon* decision. Citizens deserve the protection of FOIA and the changes you are proposing.

Please put us on your endorsement list for the "OPEN Government Act" bill. In fact, we strongly believe the *Buckhannon* error needs to be corrected for all §1983 cases.

Last, even more abusive recently is the abuse of Rule 68 to threaten and intimidate citizens already victimized once by government officials. The idea that civil rights victims, who win their suit (usually for just nominal damages), may have to pay the government's costs is obscene and a complete violation of Congressional intent. I hope we can fix this as well.

Thank you for your service to all Texans.

Sincerely,



Kelly Shackelford
Chief Counsel
Liberty Legal Institute